

IN THE COURT OF APPEALS OF IOWA

No. 3-1120 / 13-0761
Filed January 9, 2014

**IN RE THE MARRIAGE OF TERESA A. LULOFF
AND ROY L. LULOFF**

**Upon the Petition of
TERESA A. LULOFF,**
Petitioner-Appellant,

**And Concerning
ROY L. LULOFF,**
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Richard D.
Stochl, Judge.

A wife appeals the parties' dissolution decree on the issues of physical
care, spousal support, and attorney fees. **AFFIRMED.**

Timothy J. Luce of Anfinson & Luce, P.L.C., Waterloo, for appellant.

Benjamin R. Roth of Fulton, Martin & Andes, P.C., Waterloo, for appellee.

Considered by Vogel, P.J., Mullins, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MAHAN, S.J.

I. Background Facts & Proceedings.

Roy and Teresa Luloff were married in 2005. They have two minor children, born in 2007 and 2009. Teresa filed a petition for dissolution of marriage in April 2012. A dissolution hearing was held on November 7, 2012.

At the time of the hearing Roy was forty-one years old. He has been employed at Roskamp Champion for about eight years and earns \$2244 per month. He remains living in the marital residence in Waterloo, Iowa.

Teresa was forty years old at the time of the hearing. Prior to the birth of the parties' oldest child she worked at a pest control company earning \$10.25 per hour. The parties agreed she would stay home to care for the children. She recently began cleaning homes, earning between fifteen to twenty dollars per hour. She is capable of working full time. The parties stipulated to impute monthly income to Teresa of \$1158 per month. Teresa lives with her current paramour, Jason McDonald.

The district court issued a dissolution decree for the parties on February 27, 2013. The court granted the parties joint legal custody of the children, with Roy having physical care. Teresa was granted visitation and ordered to pay child support of \$225 per month. The court divided the parties' property and ordered Roy to pay an equalization payment of \$12,572. The court did not award any spousal support or attorney fees.

Teresa filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), which was denied by the district court. She now appeals.

II. Standard of Review.

This case was tried in equity, and our review is de novo. Iowa R. App. P. 6.907. In equity cases we give weight to the fact findings of the district court, especially on issues regarding the credibility of witnesses, but are not bound by those findings. Iowa R. App. P. 6.904(3)(g).

III. Physical Care.

Teresa contends the district court should have granted her physical care of the children. In the alternative, she asserts the court should have granted the parties joint physical care.

A. The parties' pretrial stipulation specifically states that Teresa and Roy both requested physical care of the children. The district court found neither party had requested a shared care arrangement, and therefore, the court did not consider it. In Teresa's post-trial motion she asked that the children be placed in the parties' joint physical care. "It is well-settled that a party fails to preserve error on new arguments or theories raised for the first time in a posttrial motion." *Mitchell v. Cedar Rapids Cmty. Sch. Dist.*, 832 N.W.2d 689, 695 (Iowa 2013). We conclude this issue has not been preserved for our review.

Even if the issue had been preserved, one of the factors for determining whether joint physical care is appropriate is "the degree to which the parents are in general agreement about their approach to daily matters." See *In re Marriage of Hansen*, 733 N.W.2d 683, 699 (Iowa 2007). Here, the parents were not in agreement about several matters concerning the children's daily lives. The parents were not "operating from the same page on a wide variety of routine

matters.” See *id.* We conclude joint physical care would not be appropriate under the facts of this case.

B. In determining the physical care of children, our first and governing consideration is the best interests of the children. Iowa R. App. P. 6.904(3)(o). We consider those factors found in Iowa Code section 598.41(3) (2011), as well as those found in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). *Hansen*, 733 N.W.2d at 696. The court’s objective is to place the children in an environment most likely to bring them to healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996).

On our de novo review, we first make a specific finding that Teresa is not a credible witness. During the dissolution hearing she admitted she had lied to Roy during the marriage, had lied during a pretrial hearing, and had lied in her deposition. Her response was that she knew Roy would not approve of some of her activities with the children, and in order to ensure she had her way, she had not been truthful. We believe this same attitude colored much of her testimony at the dissolution hearing.

In order to protect the children’s privacy and best interests, we will not discuss the factual background of this case. We concur in the district court’s conclusion that the problem is not Teresa’s lifestyle choices, but her decision to involve the children in those choices and her decision to mislead Roy about what she was doing with the children. We conclude it is in the children’s best interests to be placed in Roy’s physical care.¹ See *In re Marriage of Erickson*, 491 N.W.2d

¹ We note that we emphatically concur in the prohibition as set forth in the dissolution decree concerning the children’s contact with non-family members during

799, 803 (Iowa Ct. App. 1992) (noting the court had assessed the credibility of the witnesses in making a physical care determination).

IV. Spousal Support.

Teresa contends the district court should have granted her spousal support. She points out the parties made a joint decision that she would stay home to care for the children, and from 2007 until recently she had not worked outside the home. She asks to be awarded rehabilitative alimony of \$400 per month for thirty-six months.

Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). Alimony is not an absolute right; an award depends upon the circumstances of the particular case. *Id.* In making an award of alimony, the court considers the factors set forth in Iowa Code section 598.21A(1). *In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005). We give the district court considerable discretion in awarding alimony; we will disturb the court's ruling only when there has been a failure to do equity. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998).

The district court found, "due to the lack of evidence submitted on the issue and based on the limited duration of this marriage and a lack of showing of need, the request is denied." Teresa did not present any evidence of her current income or her expenses. The parties stipulated she had an imputed income of \$1158 per month. Furthermore, she testified she was earning between fifteen to

Teresa's visitation time. We point out that this prohibition includes Teresa's paramour, Jason.

twenty dollars per hour cleaning houses and had the ability to work full time. We agree with the district court's conclusion that Teresa did not present sufficient evidence to support an award of spousal support.

V. Attorney Fees.

A. Teresa claims the district court should have awarded her trial attorney fees. She points out that Roy's income was greater than hers. We review the district court's decision granting or denying a request for trial attorney fees for an abuse of discretion. *In re Marriage of Kimbro*, 826 N.W.2d 696, 704 (Iowa 2013). Based on the facts of this case, we conclude the court did not abuse its discretion in denying Teresa trial attorney fees.

B. On appeal, Roy seeks appellate attorney fees. This court has broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). We conclude each party should pay his or her own appellate attorney fees.

We affirm the decision of the district court. Costs of this appeal are assessed to Teresa.

AFFIRMED.